APR 8 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

HERMAN E. HEFLIN and
EDWARD HUELL HEFLIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 1126

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

P. H. ODOM
Jacksonville, Florida
Attorney for Petitioners

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

HERMAN E. HEFLIN and
EDWARD HUELL HEFLIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

No._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Herman E. Heflin and Edward Huell Heflin, pray for the issuance of a Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Fifth Circuit entered herein on the 9th day of February, 1942 (R. 30), petition for rehearing denied March 10, 1942 (R. 35).

JURISDICTION

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in criminal cases promulgated by this Court.

DECISION OF THE COURT BELOW

The opinion of the Court below is contained in the record beginning at page 28.

MATTER INVOLVED AND QUESTION PRESENTED

On April 14, 1941, the Petitioners, Herman E. Heflin and Edward Huell Heflin, went on trial before District Judge John W. Holland at Miami, Florida, on a charge of conspiracy to violate the alcohol tax statutes. On April 7th, testimony was concluded and arguments to the jury begun. While Mr. Roach, one of the Petitioners' attorneys, was addressing his final argument to the jury, Judge Holland, without notice to counsel and without suspending or adjourning Court, left the bench and the courtroom and retired to a lavatory some distance away from the courtroom where he heeded a call of nature. During the absence of the Judge, the door between the courtroom and the adjacent anteroom was closed and the door between the adjacent anteroom and the Judge's private lavatory was closed (R. 13). The Judge remained absent from the courtroom and out of sight and hearing of counsel and jury for several minutes. The jury observed the Judge's departure. Mr. Roach did not know when Judge Holland had left the courtroom (although he later noticed his absence) and he continued his address throughout the absence of the Judge and after his return to the bench.

The question presented is: Did this action by the Trial Judge deprive the Petitioners of their right to a fair trial by an impartial jury as guaranteed to them by the Constitution?

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in approving the

action of the trial judge:

1. In absenting himself from the courtroom for a short period of time during the trial while Defendants' counsel was arguing said cause to the jury (R. 17).

2. In denying the Defendants' motion for a new trial (R.17).

3. In entering final judgements of conviction (R. 25).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Petitioners contend that this is a proper case for the granting of a Writ of Certiorari for the following reasons, among others:

Because the United States Circuit Court of Appeals, Fifth Circuit, in affirming the judgment of the District Court:

(a) Has decided important questions of law in a way in conflict with applicable decisions of this Supreme Court.

(b) Has decided important questions of law in a way which conflict with applicable local decisions.

(c) Has decided important questions of general law and its decision is in conflict with the great weight of authority, and with the decisions of at least one other Circuit Court of Appeals and of this Supreme Court.

(d) Has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower court as to call for an exercise of the power of supervision by the United States Supreme Court.

(e) Has rendered null and void the safeguards of the Sixth Amendment to the Constitution of the United States which provides that

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury."

In view of the foregoing reasons and the supporting brief hereafter attached, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

ARGUMENT IN SUPPORT OF PETITION

The simple contention here is that the Petitioners

did not receive the trial by jury guaranteed to them by the Constitution. As was said by Mr. Justice Gray in Capital Traction Co. vs. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L.Ed. 873: (cited with approval in Patton vs. U.S. 50 S. Ct, 253, U.S. 276, 289, 74 L.Ed, 854)

> " 'Trial by jury', in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution of their verdict; but is a trial by a jury of twelve men, **in the presence and under the superintendence of a judge** empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its distinct assertion."

In 16 Corpus Juris, Criminal Law, page 812, Sec. 2061, the general rule, well supported by authorities, is thus stated:

> "In prosecutions for felonies, a great majority of cases lays down the general rule that the continued presence of the Judge during the entire course of the trial is essential to the validity of the proceedings and that his absence during any part of the trial, such as during the examination of witnesses, **during the argument of counsel**, or at the handing in of the verdict, whereby he is not in a position to discharge his duties effectively, may vitiate the proceedings unless he orders a suspension of the proceedings until he returns."

In Slaughter vs. United States, 5 Ind. T. 234, 82 S.W. 732, decided by the Court of Appeals of the Indian

Territory in 1904, the precise question raised here was determined by the Court in the following language:

> "The question is, was the absence of the trial judge from the trial during the argument of the United States Attorney reversible error? We have examined many authorities, and we have come to the conclusion that in the trial of a capital case without the presence of a presiding judge at all times to uphold the majesty of the law and enforce its mandates there can be no trial such as is contemplated by the law. The proceedings will not run without his superintending and controlling power **even for a moment**. If it becomes necessary for the presiding judge to retire for a few minutes, he should suspend the proceedings until his return. Nor does it make any difference whether he retires from the courtroom during the introduction of the evidence or the **argument of counsel**. The argument is just as much a part of the trial as the introduction of testimony, and to be able to pass upon the motion for a new trial the judge should be present in the court at all time during the progress of the case from the time the clerk calls the jury to the box until they retire with their sworn officer to consider their verdict. The power of the court to suspend the proceedings at all times is ample, and the better practice is to order a suspension if it becomes necessary for the judge to absent himself from the courtroom."

The precise point here in controversy has been presented to and decided by the Circuit Court of Appeals for the Second Circuit in Freeman vs. United States, 227 Fed. 732, 759. One judge heard the witnesses for for the State and became incapacitated through illness. Another judge, **by consent of all parties,** substituted for the first jurist and tried the rest of he

case. In reversing the conviction, the Court wrote:

> "It is not questioned that it is the duty of a trial judge to be present during all the stages of a criminal trial. His absence during the examintion of a witness, during the argument of counsel, or at the handing of a verdict, has been held to constitute reversible error. See People vs. Blackman, 127 Cal. 248, 59 Pac. 573; Thompson v. People, 144 Ill. 378, 32 N.E. 968; Ellerbe v. State, 75 Miss. 22, 522 South, 950, 41 L.R.A. 569 * * *
>
> "It is the opinion of this court that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end. It is not possible for either the government or the accused, or for both, to consent to a substitution either of one judge for another judge, or of one juror for another juror. THE CONTINUOUS PRESENCE OF THE SAME JUDGE AND JURY IS EQUALLY ESSENTIAL THROUGHOUT THE WHOLE OF THE TRIAL".

The Slaughter and Freeman cases, supra, apparently are the only Federal cases in which this question has ever arisen. The overwhelming authority among the State decisions supports the proposition above set forth. The Circuit Court of Appeals below, in its opinion (R.28) cites with approval all the cases above set forth but justifies its refusal to follow these cases by saying:

> "In the present case, it clearly appears that no prejudice of any sort to the Defendants occurred. Nothing happened during the absence of the Judge except what their own counsel was saying. Counsel on observing that the Judge was absent, could have paused until his return but saw fit to

continue and made no complaint until after a verdict of guilty. We think this is a clear case for applying the provision of 28 U.S.C.A. 391 (the harmless error statute)".

In none of the cases cited above was it made to appear that during the Judge's absence there occurred any overt act detrimental to the Defendant. In the Beuerman case, supra, the Judge, as here, left the bench and the courtroom **during the argument on behalf of the Defendant** and remained away for "about 10 minutes". The majority rule is based on the sound theory that the moment the presiding judge leaves the sight and sound of the courtroom the continuity of the trial is immediately broken and from that moment there is in truth no trial. It is immaterial whether anything happened or failed to happen during his absence. His superintendence and control of the trial was at an end. If any questions or controversy had arisen, he could not have passed upon them intelligently.

In addition to the strictly legal and constitutional precedents above set forth, there is at least one other important question involved - the inevitable **effect** the absence of a judge during argument of counsel must have upon a jury. When, during counsel's address, the judge deliberately and without explanation leaves the courtroom, a jury will naturally construe this action as a reflection upon the importance or the merit of the argument and the effect on the client's cause necessarily is adverse. Under such circumstances the Defendant does not receive a fair trial.

CONCLUSION

It is therefore respectfully submitted that this Petition for a Writ of Certiorari should be granted.

P. H. ODOM
Graham Building
Jacksonville, Florida
Attorney for Petitioners

INDEX

Jurisdiction....2
Decision of the Court Below....2
Matter Involved and Question Presented....2
Specification of Errors....2
Reasons Relied on for the Allowance of Writ....3
Argument in Support of Petition....3
Conclusion....7

CITATIONS

United States Constitution, Sixth Amendment....3
28 U. S. C. A. 391....7
240 (a) Judicial Code....2
16 Corpus Juris, Criminal Law, page 812, Sec. 2061....4

CASES

Capitol Traction Co. vs. Hof, 174 U.S. 1, 19 S.Ct 580, 43 L.ED. 873....4

Ellerbe v. State, 75 Miss. 522, 22 South, 950, 41 L.R.A. 569....6

Freeman v. United States,227 Fed. 732, 759....5

Patton v. United States, 50 S. Ct. 253, 281 U.S. 276, 289, 74 L.ED. 854....4

People v. Blackman, 127 Cal. 248, 59 Pac. 573....6

Slaughter v. United States, 5 Ind. T. 234, 82 S.W. 732....4

Thompson v. People, 144 Ill. 378, 32 N.E. 968....6

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Bucklin v. *United States*, 159 U. S. 682	2
Buckner v. *Hudspeth*, 105 F. (2d) 396, certiorari denied, 308 U. S. 553	5
Cahill v. *Mayflower Bus Lines*, 7 F. Supp. 869 (S. D. N. Y.), affirmed, 77 F. (2d) 838	6
Capital Traction Co. v. *Hof*, 174 U. S. 1	3
Ellerbe v. *State*, 75 Miss. 522 (1897)	4
Freeman v. *United States*, 227 Fed. 732	6
Gasoline Products Co. v. *Champlin Co.*, 283 U. S. 494	4
Glasser v. *United States*, Nos. 30, 31 and 32, present Term, decided January 19, 1942	5
Hagner v. *United States*, 285 U. S. 427	6
Patton v. *United States*, 281 U. S. 276	3, 6
People v. *Blackman*, 127 Cal. 248 (1899)	4
Pietch v. *United States*, 110 F. (2d) 817, certiorari denied, 310 U. S. 648	6
Pritchett v. *State*, 92 Ga. 65 (1893)	4
Shaffer v. *State*, 124 Neb. 7 (1932)	4
Simons v. *United States*, 119 F. (2d) 539, certiorari denied, No. 192 this Term, October 13, 1941	6
Slaughter v. *United States*, 5 Ind. T. 234	4
State, The, v. *Beuerman*, 59 Kan. 586 (1898)	4
State v. *Dobry*, 217 Iowa 858 (1933)	4
Thompson v. *The People*, 144 Ill. 378 (1893)	4
Turbeville v. *State*, 56 Miss. 793 (1879)	4
Walker v. *Southern Pacific Railroad*, 165 U. S. 593	4
White v. *State*, 61 Tex. Cr. R. 498 (1911)	4

458161—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1126

HERMAN E. HEFLIN AND EDWARD HUELL HEFLIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 27–28) is reported in 125 F. (2d) 700.

JURISDICTION

The judgment of the circuit court of appeals was entered February 9, 1942 (R. 28), and the petition for rehearing (R. 29–32) was denied March 10, 1942 (R. 33). The petition for a writ of certiorari was filed April 8, 1942. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial judge's short absence from the courtroom while petitioners' counsel was making his final argument to the jury constituted a deprivation of a trial by jury.[1]

STATEMENT

Petitioners were convicted on April 17, 1941 (R. 1–2), in the United States District Court for the Southern District of Florida upon an indictment charging that they conspired to violate the internal revenue laws relating to liquor and were sentenced to imprisonment for a term of eleven months and fifteen days (R. 22–24).

During the final argument to the jury by one of the attorneys for the petitioners, the trial judge left the courtroom for two or three minutes to go to the lavatory, returning before the argument was completed (R. 1–2, 6, 11–12, 13, 15). The lavatory was off an anteroom connecting with the courtroom, and, during the period of the judge's absence, the door between the courtroom and the anteroom and the door between the anteroom and

[1] This question was first raised on motion for a new trial and, hence, would seem not to be reviewable. *Bucklin* v. *United States*, 159 U. S. 682, 685. However, since the circuit court of appeals considered the question, we discuss it.

the lavatory were closed (R. 13). Petitioners' counsel noticed that the judge was gone, but did not object, and proceeded with his argument (R. 2, 8, 12). There was no commotion or interruption of the argument (R. 6, 7, 15) and no question for ruling or determination by the judge arose during his absence (R. 7, 12). Upon the judge's return, petitioners' counsel did not refer to the judge's absence, make any objection, or take any exception (R. 2, 12). Nothing was said about the incident by either defense or Government counsel (R. 10, 15). After the trial, however, petitioners moved for a new trial upon this ground (R. 2), a hearing was held (R. 2–13), and the motion was denied (R. 13).

ARGUMENT

Petitioners' sole contention (Pet. 3–4) is that the right to trial by jury guaranteed by the Sixth Amendment includes the presence of a judge during the entire trial, and that the judge, by leaving the courtroom for two or three minutes while petitioners' counsel was engaged in his final argument to the jury, deprived them of their constitutional right. It is true that trial by jury "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts * * *." *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13–14; *Patton* v. *United States,* 281 U. S. 276, 288. But, realistically viewed, it is clear that

these requisites of a jury trial were not vitiated by the short absence of the judge in the present case. His ability to instruct the jury on the law and to advise them on the facts was not impaired by his failure to hear a part of the argument of petitioners' counsel which was directed toward the jury, and no question arose during his absence which required his determination. To hold in such circumstances that petitioners were denied a jury trial would be to ignore the fact that "the Constitution is concerned, not with form, but with substance." *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498; *Walker* v. *Southern Pacific Railroad*, 165 U. S. 593, 596.[2]

Petitioners do not argue that the convictions were unsupported by the evidence or that they

---

[2] In *Slaughter* v. *United States*, 5 Ind. T. 234; *Ellerbe* v. *State*, 75 Miss. 522 (1897), and *Thompson* v. *The People*, 144 Ill. 378 (1893), cited by petitioners (Pet. 4–5, 6), objections were made to the argument to the jury on which the judge was unable to rule due to his absence. In *People* v. *Blackman*, 127 Cal. 248 (1899) (Pet. 6), the judge was absent while the prosecuting attorney was arguing to the jury. The opportunities for prejudice in such a case are apparent. In *The State* v. *Beuerman*, 59 Kan. 586 (1898), referred to by petitioners (Pet. 7), the court reversed for other errors during the course of the trial and refused to rule on the effect of the judge's absence (59 Kan., at 592). Where no prejudice accompanied the judge's action, the state courts have refused to reverse, contenting themselves with pointing out that the better practice is to take a recess. *White* v. *State*, 61 Tex. Cr. R. 498 (1911); *Turbeville* v. *State*, 56 Miss. 793 (1879); *Pritchett* v. *State*, 92 Ga. 65 (1893); *State* v. *Dobry*, 217 Iowa 858 (1933); *Shaffer* v. *State*, 124 Neb. 7 (1932).

were not afforded a fair trial.[3] The judge's absence was at most a technical error which neither prejudiced petitioners nor denied them a substantial right. Accordingly, the circuit court of appeals properly affirmed the convictions (R. 28) under Section 269 of the Judicial Code (28 U. S. C. 391), providing that "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors * * * which do not affect the substantial rights of the parties."

Moreover, even if the absence of the trial judge during argument to the jury should be regarded as a deprivation of a constitutional right, petitioners now have no standing to argue the issue. Constitutional guarantees may be waived, and petitioners' failure to object or even comment upon the judge's absence until after the trial must be deemed such a waiver. Cf. *Buckner* v. *Hudspeth,*

[3] However, they do argue (Pet. 7) that the judge, by leaving the courtroom during counsel's argument to the jury, may have caused the jury to believe that that argument had little importance or merit. The answer to this contention is that if counsel had called the court's attention to the possibility of prejudice, the alleged reflection upon counsel's argument could have been dissipated by an instruction to the jury that no such reflection was intended. As this Court has said, "We must guard against the magnification on appeal of instances which were of little importance in their setting" (*Glasser* v. *United States*, Nos. 30, 31, and 32, present Term, decided January 19, 1942).

105 F. (2d) 396, 397 (C. C. A. 10), certiorari denied, 308 U. S. 553; *Pietch* v. *United States,* 110 F. (2d) 817, 819 (C. C. A. 10), certiorari denied, 310 U. S. 648; *Hagner* v. *United States,* 285 U. S. 427, 433.[4]

CONCLUSION

The case was correctly decided below, there is no question of general importance, and there is involved no conflict of decisions warranting certiorari. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
HAROLD F. REIS,
Attorneys.

MAY 1942.

---

[4] *Freeman* v. *United States*, 227 Fed. 732, 759 (C. C. A. 2), upon which petitioners rely (Pet. 5–6), does not present a comparable situation. Moreover, as was pointed out in *Simons* v. *United States*, 119 F. (2d) 539, 543–544 (C. C. A. 9), certiorari denied, No. 192, this Term, October 13, 1941, the *Freeman* case was predicated upon the premise that none of the aspects of a jury trial may be waived. This premise has been destroyed by the decision of this Court in *Patton* v. *United States*, 281 U. S. 276, 290. See also *Cahill* v. *Mayflower Bus Lines*, 7 F. Supp. 869, 872 (S. D. N. Y.), affirmed, 77 F. (2d) 838, 840 (C. C. A. 2).

U. S. GOVERNMENT PRINTING OFFICE: 1942